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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

PETITION FOR CLARIFICATION AND REHEARING.

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PETITION FOR CLARIFICATION AND REHEARING.

EMICH MOTORS CORPORATION and U. S. ACCEPTANCE CORPORATION, petitioners, pray for clarification of this Court's opinion dated February 26, 1951, and for rehearing, for the following purposes:

1. To pass upon part (b) of the issue upon which this court granted review, *i. e.*, to determine, as stated in the language of the order granting certiorari, "whether the Court of Appeals erred in construing Section 5 of the Clayton Act * * * as not permitting * * * (b) the judgment * * * [in the antecedent criminal case against the respondents] to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation."

2. To clarify its order of reversal to indicate the intended scope thereof.

I.

The Opinion Does Not Pass Upon Part (b) of the Issue Upon Which This Court Granted Review.

As stated in the opinion: "The issue we must determine, as defined in our order granting review, is 'whether the Court of Appeals erred in construing Section 5 of the Clayton Act * * * as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation.'"

Part (a) of the above issue, while not answered directly, apparently was answered impliedly under the general rule announced that the mechanics of apprising the jury concerning the prior proceedings was a matter for the broad discretion of the trial judge. Presumably, therefore, he could permit the indictment to go to the jury under proper instructions.

But part (b) of the issue apparently was not answered at all. The opinion seems to stop short of an answer, even by implication. And since the matter was briefed and the opinion itself shows the Court originally undertook to review this question, it is likely that the opinion may be misunderstood by advocates and judges straining for an answer.

In respect to part (b) of the issue upon which review was granted, petitioners contend:

(1) Without Section 5 of the Clayton Act, the prior criminal judgment could not have been introduced into evidence in the trial below because it would have constituted inadmissible hearsay.

(2) Section 5, therefore, may be construed as having

created, among other things, a statutory exception to the hearsay rule.

(3) But the question remains: To what extent did Section 5 remove the barrier of the hearsay rule? To the extent of permitting the judgment to be used as evidence of those matters which it tends to prove *circumstantially*, as well as those it purports to prove *directly?*

(4) Section 5 does not state in so many words how far the hearsay rule was intended to be relaxed.

(5) In view of the Congressional intent that the private suitor be given maximum evidentiary use of the judgment won by the Government, Section 5 should be construed as permitting the prior judgment to be used as circumstantial, as well as direct, evidence.

In the instant case, petitioners argued that if the trial court's instruction had in fact left the jury with the impression that the criminal judgment was evidence of Emich Motors' cancellation—an erroneous interpretation placed upon the instructions by the Court below—the instruction nevertheless would have been proper because: (a) Section 5 permits the prior judgment to be used as circumstantial, as well as direct, evidence; and (b) the prior judgment qualifies as circumstantial evidence of Emich Motors' cancellation. This latter proposition was demonstrated in petitioners' reply brief (p. 15), wherein it was argued that the criminal judgment was direct evidence that there was a conspiratorial agreement of the kind pleaded and also that the agreement was carried out, or as this Court now states, was effectuated, "by coercing General Motors dealers to use GMAC." There being no dispute that Emich Motors was in fact cancelled, the only question was whether the frame of mind of Chevrolet in cancelling Emich Motors was to carry out the conspiratorial agreement by the inherently coercive act of cancellation.

The direct evidence of a conspiratorial agreement and its effectuation by coercive acts against dealers logically tends to prove the frame of mind with which the inherently coercive act of cancellation occurred in the case of any one dealer—in this case, Emich Motors. Therefore, direct evidence of the former is, at one and the same time, circumstantial evidence of the latter. This is in keeping with the well established rule of relevancy applied in *Lisenba* v. *California,* 314 U. S. 219, 227-228; *Williamson* v. *U. S.,* 207 U. S. 425, 450-451; *Devoe* v. *U. S.* (C. A. 8), 103 F. (2d) 584, 588-589; *Huff* v. *U. S.* (C. A. 5), 228 F. 892, 893.

This Court's opinion, after stating, in substance, that the criminal judgment was direct evidence of the conspiratorial agreement and of its effectuation by coercing dealers, expressly left undecided whether the criminal judgment could be used as circumstantial evidence, as well. It did so apparently on the supposition that this issue did not involve a question of construction of Section 5, but instead, that it involved merely a consideration of the general law of evidence. (See Opinion p. 8, footnote.) It is petitioners' view that this supposition is erroneous. Absent Section 5, the criminal judgment would have been in admissible hearsay. Section 5 relaxed the hearsay rule. To what extent? This, we submit, is purely a question of statutory construction. The general law of evidence as to relevancy becomes a factor *only after Section 5 has been construed* as permitting the judgment to be used as circumstantial, as well as direct, evidence. Moreover, only by grace of Section 5 could the possibility exist, as recognized in the opinion (p. 8, footnote), that the judgment as evidence of illegal motive was of such specially high degree as to be deemed "prima facie" proof thereof.

Thus, from the foregoing it may be seen that when the opinion left undecided the question as to whether Section 5 permits the judgment to be used as circumstantial evidence, it stopped short of deciding part (b) of the issue which the

Court previously had expressly undertaken to decide, *i. e.*, "whether the Court of Appeals erred in construing Section 5 * * * as not permitting * * * (b) the judgment * * * to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellation."

II.

The Order of Reversal Requires Clarification.

At the end of the opinion, this Court ruled:

> "The judgments below must therefore be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.
>
> It is so ordered."

The reversal of "the judgments" might be understood to include the judgments entered by the trial court. But if this were so, the only action which it would seem the trial court could take, under such circumstances, would be to conduct a new trial. However, this Court has not seen fit to order a new trial in so many words, but merely to remand the cause to the trial court for further proceedings in conformity with the opinion. From this, it might be inferred that the trial court's judgments are not necessarily reversed. This requires clarification.

Respectfully submitted,

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